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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

TIMOTHY JAMES,

Defendant and Appellant.

B204590

(Los Angeles County
Super. Ct. No. TA092091)

APPEAL from a judgment of the Superior Court of Los Angeles County, David Sotelo, Judge. Affirmed.

Tara K. Allen, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Victoria B. Wilson and Noah P. Hill, Deputy Attorneys General, for Plaintiff and Respondent.

BACKGROUND

In an information, the People charged defendant Timothy James with one count of possession of a controlled substance (cocaine base) (Health & Saf. Code, § 11350, subd. (a)) and alleged that he suffered six prior felony convictions within the meaning of the “Three Strikes” Law (Pen. Code, §§ 667, subds. (b)-(i), 1170.12) and served five prior prison terms (*id.*, § 667.5, subd. (b)). The People further alleged that defendant had been convicted of five felonies within the meaning of Penal Code section 1203, subdivision (e)(4), rendering him ineligible for probation.

Defendant successfully asserted his right to self-representation, after which he was arraigned, pled not guilty and denied all allegations. On the day of trial, defendant withdrew his plea of not guilty, waived his constitutional rights, pled no contest to the charged offense and admitted the truth of one prior “strike.”

On the date of sentencing, defendant filed a motion to vacate his plea, claiming he had been deprived of the effective assistance of counsel and his sentence was illegal under *Blakely v. Washington* (2004) 542 U.S. 296 [124 S.Ct. 2531, 159 L.Ed.2d 403]. The trial court denied the motion. Subsequently, the court sentenced defendant to the midterm of two years, doubled as a second strike, for a total of four years in state prison, and awarded him presentence custody credit. On the People’s motion, all remaining sentencing allegations were dismissed.

Defendant filed a notice of appeal and requested a certificate of probable cause. The trial court granted defendant’s request.

CONTENTIONS

Defendant contends (1) the trial court failed to obtain a competent, knowing and intelligent waiver of his right to counsel; (2) his constitutional rights to counsel and due process were violated by the trial court’s refusal to hear his request to withdraw his waiver of counsel; and (3) his lack of access to the “pro per module” at county jail was an

unconstitutional restriction on his right to self-representation under the Sixth and Fourteenth Amendments.

DISCUSSION

A. Waiver of Right to Counsel

Under *Faretta v. California* (1975) 422 U.S. 806, 818-821 [45 L.Ed.2d 562, 95 S.Ct. 2525], a defendant has the “right to represent himself if he voluntarily and intelligently elects to do so.” (*People v. Burton* (1989) 48 Cal.3d 843, 852.) Where a defendant seeks to represent himself, he ““should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that “he knows what he is doing and his choice is made with eyes open.”” [Citation.] The test of a valid waiver of counsel is not whether specific warnings or advisements were given but whether the record as a whole demonstrates that the defendant understood the disadvantages of self-representation, including the risks and complexities of the particular case. [Citations.]” (*People v. Bloom* (1989) 48 Cal.3d 1194, 1224-1225.)

Deputy Public Defender A.J. Bayne represented defendant at his preliminary hearing. At defendant’s arraignment on September 10, 2007, Attorney Bayne informed the trial court that defendant wanted to represent himself. The trial court stated its disbelief that someone with six strikes who is facing 30 years to life would want to represent himself but noted that “if he thinks he qualifies, we have forms he can fill out.”

Defendant filled out a petition to proceed in pro. per. This petition enumerated defendant’s constitutional rights, including his right to counsel. Defendant acknowledged in writing that he understood his constitutional rights but wanted to give up his right to counsel and proceed in pro. per. Defendant further acknowledged, by initialing numerous paragraphs, among other things, that if the court granted him pro. per. status, he would have to conduct his own defense without the aid of counsel; that the court might, depending upon the state of the proceedings, deny a request to give up his pro. per. status and appoint him an attorney; that he had been given and read a copy of the Los

Angeles Superior Court Pro Per Policy and understood the rights and restrictions described therein and would follow the directions set forth in the policy; that if he accepted court-appointed counsel, an experienced attorney would be assigned to try his case; that the trial court advised and recommended that defendant not represent himself and accept court-appointed counsel; that without counsel, he would be required to follow all technical rules of substantive law, criminal procedure and evidence; that the People would be represented by a deputy district attorney who was an experienced and highly specialized trial attorney; that defendant would not be entitled to special consideration or assistance by the court during trial; and that by representing himself, he was giving up and waiving ineffective assistance of counsel as a possible ground for appeal.

Upon reviewing defendant's petition to proceed in pro. per., the trial court noted that defendant had not filled out the section of the petition pertaining to whether his crime was a general or specific intent crime. The court explained the difference between the two types of intent and told defendant that he was charged with possession of narcotics, which was a general intent crime. Defendant confirmed that he understood. The following colloquy then transpired:

"THE COURT: Now, you also didn't put down the minimum/maximum sentence. The maximum sentence, as I indicated, if everything was proved that you possessed the narcotics, that each of the six strikes are proven true and each of the five one-year priors is true, it is 30 years to life, the minimum sentence.

"I suppose any judge would have discretion to strike the one-year priors, which would mean it would be 25 to life, although a court might have discretion to strike that one strike and then your sentence would be 25 to life. And if they struck two strikes, it would be 25 to life. Three strikes, 25 to life. Even if four strikes were stricken, it would be 25 to life. [¶] I can't imagine any judge would strike six strikes, but if they did, your maximum would be three years. [¶] So you understand the maximum sentence, right?

"THE DEFENDANT: No, not really.

"THE COURT: How can you represent yourself if you don't know what your maximum sentence is?

“THE DEFENDANT: I didn’t intend to represent myself, but I tried to get a change of attorney when I was in municipal court last court date, but they refused to do so. So if that’s what I got to do instead of being represented by [Attorney Bayne], that’s what I have to do.”

At this juncture, the trial court conducted a *Marsden*¹ hearing. During this hearing, the trial court told defendant that although “the charge of possession of narcotics in the big scheme of things is not as serious as some felonies,” because of the strike allegations, “it becomes a huge problem for you and you are better off having a lawyer than not.” Defendant stated his belief that Attorney Bayne should have been helping him to get into a drug treatment program rather than encouraging him to accept a plea agreement requiring state prison. Defendant further complained that Attorney Bayne acted sarcastically towards him, and acted “like what goes on with me don’t matter.”

The trial court then stated, “My concern is that, if you had no record, a relatively minor crime, but then such a huge crime, because of your record —I’ve never had a proper win, even those who know what they are doing and have done it before.” Defendant responded that he would rather be convicted after representing himself than be represented by “somebody that doesn’t take my interests and doesn’t care what happens to me.”

The trial court inquired, “how would you feel in two months if you get sentenced to 30 years to life representing yourself and you could have had 4 years represented by [defense counsel]?” Defendant replied, “Well, four years is 30 to life with me anyway. I just did six years straight. I stayed out five days. So four years is life.” Attorney Bayne denied being sarcastic and explained that defendant became angry when he explained that the evidence was not in defendant’s favor and that he should consider accepting a plea offer from the People since the offer of a drug program would not be forthcoming. The following exchange then took place:

¹ *People v. Marsden* (1970) 2 Cal.3d 118.

“THE COURT: You are not getting another lawyer. [Attorney Bayne has] tried a lot of cases —

“THE DEFENDANT: You said I’m not getting another lawyer?

“THE COURT: Just because he is telling you you will lose doesn’t mean —

“THE DEFENDANT: Am I pro per?

“THE COURT: Do you understand the maximum sentence if you lose?

“THE DEFENDANT: I don’t even care, man.

“THE COURT: If you don’t understand it, I’m not sure I can give you pro per [status].

“THE DEFENDANT: That is my right, to be pro per.

“THE COURT: It’s your right as long as you are educated and understand the procedures. If you don’t understand and can’t defend yourself, then you don’t have a right.

“THE DEFENDANT: So you feel I’m not educated?”

“

“THE COURT: Let me make it easier. We talked about maximum sentencing, you go away 30 years to life. You understand that is the worst that could happen; right?

“THE DEFENDANT: Yes.

“THE COURT: If you win, you get to go home.

“THE DEFENDANT: I know I ain’t going home.

“THE COURT: If the jury acquits you, you get to go home.

“[ATTORNEY BAYNE]: Do you understand?

“THE DEFENDANT: Yes.

“THE COURT: The only other thing is if you go to trial with a lawyer and lose, one of the grounds on appeal can be I had a bad lawyer. In other words, I lost because [he] did a bad job. If you represent yourself, you can’t say, ‘I did a bad job.’

“THE DEFENDANT: I understand all that.

“THE COURT: And understanding all that, you still want to go pro per?

“THE DEFENDANT: Yes.”

Following the in camera hearing, the trial court denied defendant's *Marsden* motion and officially granted defendant pro. per. status. The court stated, "I've been convinced with our discussions that [defendant] understands what he's getting into. And so what we need to do is now relieve Mr. Bayne."

Defendant's contention that the trial court failed to obtain a competent, knowing and intelligent waiver of his right to counsel lacks merit. The record as a whole indisputably demonstrates that defendant understood the dangers and disadvantages of self-representation. He understood the risks that he faced given the numerous sentencing allegations against him. That defendant elected to represent himself simply because he was unsuccessful in securing a change of counsel does not compel a contrary conclusion. Defendant competently, knowingly and intelligently waived his right to counsel and elected to represent himself. (*People v. Bloom, supra*, 48 Cal.3d at pp. 1224-1225.)

B. Request for Reappointment of Counsel

There is no merit to defendant's contention that his constitutional rights to counsel and due process were violated by the trial court's refusal to hear his request to withdraw his waiver of counsel. As previously noted, defendant requested and received pro. per. status on September 10, 2007. At a pretrial conference held on October 16, 2007, defendant asked, "Ain't no way I can get somebody to help me?" The following exchange then transpired:

"THE COURT: Well, only if you want a lawyer. I can reappoint the public defender's office, but what I can't do is sort of have them help you as a pro per. I mean, you're here representing yourself by knowing what you're doing or you need to have a lawyer. You can't have it both ways. That's I think why we told you four weeks ago that unless you're used to doing this stuff all the time, you really don't do yourself any favor by representing yourself. But I know Mr. Bayne was your lawyer. I know you said you didn't like him. But the answer is no, I can't give you somebody to help you but I can reappoint them.

"THE DEFENDANT: Yeah. I need somebody.

“THE COURT: Why don’t I reappoint the public defender’s office. It will be Mr. Bayne.

“THE DEFENDANT: No, no, no. If you gonna redo him —

“THE COURT: I’m going to reappoint the office. Their procedure is to give it to the last lawyer who had it. I don’t know if they’re going to do that or not.

“THE DEFENDANT: If you are going to give him back to me, I’ll stay like I am.

“THE COURT: So you’re ready to go to trial? Just tell me what you need.

“THE DEFENDANT: I need to come back on the 24th.

“THE COURT: Okay. Any motions you have should be in writing. We’ll go over them on the 24th.

“THE DEFENDANT: I don’t even know how to do a motion.

“THE COURT: Then how can you represent yourself? I mean, look it, doesn’t matter whether you’re an engineer or a laborer. If you haven’t done this before, you’re not going to know what to do. So you could be a real bright guy, but if you’re not a lawyer, you don’t know what to do. That’s why I told you that. If you want to try and do it, fine. So we’ll just come back on the 24th. See what you come up with. Whatever you want me to do, give it to me in writing. I may agree or I may not. And then the 24th is a week away. If you want a lawyer then, we’ll appoint a lawyer then.”

On October 24, 2007, the trial court noted that the absence of any motions filed by defendant suggested that he was ready for trial. When defendant said he was not ready, the court reminded him that his trial date was November 7 and suggested that he do everything he could to get ready to start trial that date. The court’s minute order of October 24, reflects that defendant again asked for counsel. The court admonished defendant that if he wanted counsel, Attorney Bayne would be reappointed to represent him. Defendant declined to be represented by Attorney Bayne.

On November 7, 2007, Judge John J. Cheroske transferred defendant’s case to Department 11, Judge David Sotelo presiding, for trial. Judge Sotelo noted that before the master calendar court transferred defendant’s case to his courtroom, defendant had been offered a plea agreement of four years. Judge Sotelo inquired of defendant again

whether he wanted to take the offer. When defendant replied, “No,” the trial judge asked, “You want to go to trial?” at which point the following exchange took place:

“THE DEFENDANT: This is — I was — I was made pro per on September 10th. And I have never been sent to the pro per module or nothing. I have been in regular general population. I haven’t been able to go to the law library. I’m not prepared. I wasn’t prepared to do nothing. Filed no motions or nothing. They never sent me to the module. I’m at the point where I need an attorney to do this because I’m not ready. You’re all saying it’s starting and going to trial, and I haven’t had time to do nothing. I need someone that do know something about it.

“THE COURT: We’re not going to revisit that particular issue, Mr. James. At this point in time you have been sent from your own calendar court. And my review of the court file and discussions with the other judges that handled your matters, I will not revisit that. Either one of those issues are [not] to be brought up right now, that is, whether you want an attorney now or whether you claim you have not had access to any type of research or law library. It has already been discussed, so we’re not going back there.

“If you don’t want to resolve the case, then I need to talk to you about the fact we’re going to trial here before I order a panel of jurors down. So first things first, Mr. James.”

During a discussion of whether defendant wanted to appear before the jury in jailhouse blues, when defendant queried, “so you’re telling me I have got to represent myself?” Judge Sotelo stated, “That has already been determined. You have elected to represent yourself, so we’re not revisiting that again.” The judge then redirected defendant to the question of whether he wanted to wear regular clothes.

At that point, defendant asked if he could plead guilty under duress. The court replied, “I could not take a guilty plea if you’re under duress. I can’t force you or anybody force you.” When defendant claimed that he was being forced to go to trial and that he was “not getting a fair trial,” the judge told him he would be tried in his jail attire

unless he expressed a contrary desire. The court then turned to the question of whether defendant wanted to bifurcate the trial on his priors.

Rather than answer the court's inquiry, defendant asked if he could have the first offer proposed by the People, namely, three years. The court replied that the offer was now four years. Defendant said he would enter a plea in exchange for a sentence of four years at 50 percent. When the court explained that it would have to be four years at 80 percent because of his strike, defendant asked if he could have a two-week continuance. The court was disinclined to do so but said if defendant wanted to enter a plea, he would put sentencing over for two weeks, after which defendant said, "Okay. Okay. Let's go to prison. I'll enter a plea and call me back in 30 days." Defendant thereafter entered his plea.

Recently, in *People v. Lawrence* (2009) 46 Cal.4th 186, the California Supreme Court upheld a trial court's decision to deny a pro. per. defendant's midtrial request to withdraw his *Faretta* waiver. Although *Lawrence* differs factually from this case, the legal principles discussed therein are directly on point.

When a defendant has elected to proceed in pro. per., a subsequent request to give up the right of self-representation and for re-appointment of counsel is left to the discretion of the trial court. (*People v. Lawrence, supra*, 46 Cal.4th at pp. 191-192; *People v. Lawley* (2002) 27 Cal.4th 102, 150-151; *People v. Gallego* (1990) 52 Cal.3d 115, 164; *People v. Elliott* (1977) 70 Cal.App.3d 984, 993.) In determining whether the trial court abused its discretion in denying a request for re-appointment of counsel after a defendant has been granted pro. per. status, we examine the totality of the circumstances surrounding the trial court's ruling. (*Lawrence, supra*, at p. 192; *Gallego, supra*, at pp. 163-164.) Relevant factors include: "(1) defendant's prior history in the substitution of counsel and in the desire to change from self-representation to counsel-representation, (2) the reasons set forth for the request, (3) the length and stage of the trial proceedings, (4) disruption or delay which reasonably might be expected to ensue from the granting of such motion, and (5) the likelihood of defendant's effectiveness in defending against the charges if required to continue to act as his own attorney.'" (*Lawrence, supra*, at p. 192,

quoting *Elliott, supra*, at 993-994; accord, *Gallegos, supra*, at p. 164.) It is the totality of the facts and circumstances surrounding a defendant's request for reappointment of counsel that governs, rather than a mechanical weighing of listed factors. (*Lawrence, supra*, at p. 192, *Gallegos, supra*, at pp. 163-164.)

At the pretrial conferences held on October 16 and 24, 2007, the trial court entertained defendant's requests for counsel to be appointed to represent him. On each occasion the court stated it would grant defendant's request and reappoint Attorney Bayne to represent him. Wanting to be represented by an attorney other than Attorney Bayne, defendant declined the court's offer and elected to continue to represent himself. Inasmuch as defendant does not challenge the denial of his *Marsden* motion and he cites no authority that would have required the trial court to appoint a lawyer other than Attorney Bayne to represent him, we conclude defendant has failed to demonstrate that the court either failed to exercise or abused its discretion on these occasions.

With regard to any request for counsel defendant may have made before Judge Cheroske on November 11, 2007 in master calendar court, defendant has failed to provide this court with a reporter's transcript of the proceedings that took place before Judge Cheroske. Having failed to provide an adequate record on appeal, he has waived any claim of impropriety stemming from a request to withdraw his *Faretta* waiver and for re-appointment of counsel made in master calendar court. (*Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1295-1296.)

We also conclude that defendant has failed to demonstrate that Judge Sotelo abused his discretion in refusing to "revisit" defendant's request for appointment of counsel. Defendant cites no authority that would have required Judge Sotelo to entertain a new a request that had just been ruled upon by Judge Cheroske in master calendar court.

C. Access to Pro. Per. Module

Defendant contends his lack of access to the pro. per. module at county jail unconstitutionally restricted his right to self-representation. Defendant has failed to

provide this court with an adequate record from which to review this claim and therefore has waived it.

On September 10, 2007, after granting defendant's request for self-representation, the trial court stated, "I'm going to order the sheriff to grant you pro per status, have you in the pro per module. You will have library privileges. And as a pro per we will put \$40 in the pro per fund for supplies and telephone."

As previously detailed, on November 11, 2007, Judge Cheroske transferred defendant's case to Judge Sotelo for trial. Defendant told Judge Sotelo that he had not been to the pro per module and needed an attorney, Judge Sotelo said he would not "revisit" those issues in his courtroom, in that they already had been discussed.

It appears that Judge Sotelo was referring to a discussion of these issues that took place before defendant's case was transferred to him. Defendant, however, has failed to present this court with a reporter's transcript of the proceedings that took place before Judge Cheroske in master calendar court. In the absence of an adequate record, we are compelled to reject defendant's claim and to presume, based on Judge Sotelo's statements, that defendant raised the issue of his access to the pro. per. module in master calendar court and that Judge Cheroske correctly resolved the issue. (*Maria P. v. Riles*, *supra*, 43 Cal.3d at pp. 1295-1296.)

DISPOSITION

The judgment is affirmed.

JACKSON, J.

We concur:

PERLUSS, P. J.

WOODS, J.